IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIDNARY ORIGINAL CIVIL JURISIDICTION

CHAMBER SUMMONS NO.29 OF 2004
IN
SUIT NO.1860 OF 1981

M/s.Seiko Enterprises (Bombay) .. Plaintiffs

Vs.

1.Deviprasad Udit Narayan Misra
& Ors. ..Defendants

Mr.Leon Samuel i/b Kanga & Co. for the plaintiffs

CORAM: S.U. KAMDAR, J.

DATE : 23RD MARCH, 2005

P.C. :

1. The present Chamber Summons is taken out under Order XXII Rule 4 of the CPC 1908 for exempting the plaintiffs from bringing the heirs of deceased defendant no.3 on record and for settting aside an abatement of the suit against the deceased defendant no.3. The said Order XXII Rule 4 of the CPC reads as under:

> "4. Procedure in case of death of one of several defendants or of sole defendant.
>
> (1) Where one of two or more defendants dies

and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under the sub-rule(1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the

hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) where - (a) The plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963) and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963(36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had by reason of such ignorance, sufficient cause for not making the application within the period

specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved)

2. In the present case, I am unable to exercise such a power of giving a dispensation to bring legal heirs on the record merely on the ground that the original defendants have failed to file the written statement in the suit during their life time. According to me, the effect of granting such a relief is to pass a decree against a person even without he being heard at all. Merely because there is a default in filing a written statement by the deceased defendant no.3 in my opinion it cannot mean that the legal heirs also should not be given an opportunity to defend the case. Furthermore, had the defendant been alive he would have applied for time and extension for filing of written statement.

3. In the recent judgment of the Apex Court in the case of Iridium India Telecom Ltd Vs. Motorola

Inc. reported in (2005) 2 Supreme Court Cases 145 it has been held that the provision of Code of Civil Procedure would not apply to the Original Side of High Court and therefore the court is empowered to extend the time to file written statement merely because the defendant is expired it is not possible to hold that such power of extension of time and permitting the legal heirs to file a written statement be deprived.In my view the provisions of order XXII Rule 4 are discretionary and I am of the opinion that such a power should not be exercised which would result in manifest injustice in the case. In the aforesaid view of the matter Chamber Summons dismissed. No order as to costs.